

LAVACA-NAVIDAD RIVER AUTHORITY  
STATE OF TEXAS, WATER DEVELOPMENT BOARD

IBLA 88-97

Decided August 16, 1990

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, dismissing protests to the issuance of acquired lands oil and gas leases. NM-A 33369(TX) and NM-A 37362(TX) through NM-A 37369(TX).

Affirmed as modified.

1. Oil and Gas Leases: Acquired Lands Leases--Oil and Gas Leases:  
Known Geologic Structure

A party challenging a KGS determination by BLM has the burden of showing by a preponderance of the evidence that BLM's determination is wrong. No error is established by the fact that KGS limits conform to the boundaries of the smallest legal subdivision, surveyed tract, or lot. Lands designated within a KGS may only be leased competitively. The fact that lease proceeds serve to retire a State debt obligation for a reclamation project on the leased lands is not determinative of competitive leasing of the project lands in 1983, and is not a criterion for consideration by BLM in determining the boundaries of a KGS.

APPEARANCES: Winston P. Crowder, Esq., Houston, Texas, for Lavaca-Navidad River Authority; Harold G. Kennedy, Esq., Austin, Texas, for the State of Texas, Water Development Board; Margaret C. Miller, Esq., Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Lavaca-Navidad River Authority (LNRA) and the State of Texas, Water Development Board (State), have appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated September 29, 1987, dismissing their protests to the issuance of oil and gas leases NM-A 33369(TX) and NM-A 37362(TX) through NM-A 37369(TX). These leases issued noncompetitively for acquired lands in the Palmetto Bend Reclamation Project, Jackson County, Texas. 1/

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1/ The Palmetto Bend Reclamation Project was authorized by Congress in P.L. 90-562, 82 Stat. 999 (1968), for the purpose of storing, regulating, and furnishing water for municipal and industrial use, *inter alia*. Principal facilities of the project are a dam and reservoir on the Navidad River near Edna, Texas.

LNRA's protest of November 21, 1983, and the State's protest of December 29, 1983, are similar in large part. LNRA explained that it is a political subdivision of the State of Texas and is an interest holder and operating party in the Palmetto Bend Reclamation Project pursuant to contract No. 14-06-500-1880. <sup>2/</sup> Appellant further stated that it is a lessee in lease agreement No. 8-07-56-L0337 <sup>3/</sup> and a party to a Land and Water Resource Management Plan <sup>4/</sup> for the project lands. Appellants alleged that these instruments grant to them certain rights regarding issuance of oil and gas leases and that these rights have been violated by the United States, acting through BLM.

Specifically, LNRA charged that its rights under lease agreement No. 8-07-56-L0337 have been violated by BLM's failure to notify it or seek input from it before issuing leases NM-A 33369(TX) et al. In support, appellant quoted from part 5 of the lease agreement, which states in toto:

CONSTRUCTION MATERIALS,  
MINERAL AND OIL AND GAS RIGHTS

5. a. The United States or the Authority [LNRA] has the right to remove sand, gravel, clay, rock, or other construction materials from Leased Premises for project purposes; Provided, however, that such removal does not interfere with improvements built or completed by either party or by third-party lessees or assigns.

b. The United States has the right to grant leases under existing Federal Mineral Leasing Laws for prospecting, developing, and production of oil, gas, and other minerals to the extent of its interests in the Leased Premises. Such leases will include stipulations to protect the interests of the Authority and project facilities.

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<sup>2/</sup> This contract was entered Feb. 2, 1972, between the United States (acting through the Secretary of the Interior), LNRA, and the State, to finance construction of the Palmetto Bend Project. An amendment to this contract was made on Jan. 9, 1976. Both the original and amended contracts were signed on behalf of the United States by the Regional Director, Bureau of Reclamation (BOR).

<sup>3/</sup> This lease agreement was entered on May 31, 1978, with the United States, acting through BOR, as lessor. By this agreement, LNRA obtained a leasehold interest in certain project land and water resource areas for recreational development.

<sup>4/</sup> The plan is dated May 3, 1979, and is signed by the Regional Director, BOR, on behalf of the United States and by the General Manager, LNRA. The objective of the plan is to provide guidance or a framework for the parties to develop a program to operate, manage, and maintain land and water resources of the Palmetto Bend Project.

c. The United States and the Authority, in the exercise of any of their rights herein, shall take reasonable measures to avoid interfering with the other, or lessees or assigns of either party, including security and rights of holders of outstanding bonds covering improvements and facilities on the Leased Premises.

d. The United States and the Authority will notify the other in ample time to provide for careful review and response to such proposals prior to the exercise of any right contained herein.

e. All income derived from the sale, leasing, or production of oil, gas, and other minerals, including other construction materials, will be credited as set forth in article 8, of contract No. 14-06-500-1880.

f. The Authority, in the exercise of its rights and under terms of this agreement, will have the responsibility to determine, assess, and collect such reimbursements as appropriate for damages to the surface or to the Authority's operation as may result from permits or leases granted herein. [Emphasis added.]

The State joined LNRA in arguing that BLM had taken no action to protect appellants' financial interest in NM-A 33369(TX) et al. Appellants stated that under P.L. 90-562, supra, and the aforementioned contracts, they are entitled to receive credit for a share of the income derived from oil and gas leases in the project. The Department must act in a fiduciary capacity in protecting these rights, appellants maintained, and its failure to require competitive bids for NM-A 33369(TX) et al. breached that duty.

The State and LNRA argued that BLM relied upon an unreasonable interpretation of 30 U.S.C. § 226 (1982) in issuing NM-A 33369(TX) et al. noncompetitively. Under the terms of this statute prior to its 1987 amendment, 5/ lands within a known geologic structure (KGS) of a producing oil or gas field can be leased, if at all, only by competitive bidding. Appellants argue that BLM's definition of the phrase "known geologic structure of a producing oil or gas field," as found at 43 CFR 3100.0-5(1) (1987), is contrary to the statute, and denies to them compensation from competitive bidding for project lands. Appellants also maintain that there are many oil and gas wells present in the project area to support their position that the project area should be leased competitively.

In its decision of September 29, 1987, 6/ BLM held that subsequent geologic investigation supported the expansion of the KGS area by

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5/ P.L. 100-203, § 5102, 101 Stat. 1330-256 (1987).

6/ This decision was BLM's second effort at addressing appellants' 1983 protests. In early 1984, BLM denied each protest as untimely and held, inter alia, that appellants' arguments addressing 30 U.S.C. § 226 (1982) were unsound. LNRA and the State filed appeals with this Board, but before

330 acres, 7/ but that further expansion was unjustified. The State's claim of breach of fiduciary duty could not be asserted against BLM, the decision stated, because BLM was not a party to contract No. 14-06-500-1880. LNRA's argument that it had a right under lease agreement No. 8-07-56-L0337 to be notified of leasing in the project area was also rejected by BLM on the same basis. BLM held that no statute or regulation imposed upon it an affirmative duty to the State, or a duty to notify LNRA of leasing proposals. BLM acknowledged that it did have a duty to consult, but stated this duty ran only to BOR.

The relief sought by appellants in this protracted litigation is rescission of oil and gas leases NM-A 33369(TX) et al. (Statement of Reasons, Dec. 3, 1987, at 6-7). With respect to lease NM-A 33369(TX), we note that this lease terminated by operation of law on or about June 1, 1987. No petition for reinstatement having been timely filed, the controversy has become moot as to this lease. We will, accordingly, limit our consideration of appellants' arguments to the eight remaining leases, NM-A 37362(TX) through NM-A 37369(TX). 8/

Offers for these eight leases were filed over-the-counter by Bruce Anderson on May 30, 1979. Because some of the lands described were found to be in a KGS, BLM rejected offer NM-A 37362(TX) in toto and the seven other offers in part by decisions issued in October 1980. Anderson appealed BLM's decisions affecting offers NM-A 37362(TX), NM-A 37368(TX),

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fn. 6 (continued)

these cases were reached for review, the Acting Assistant Secretary for Land and Minerals Management rescinded BLM's 1984 decisions, directed the agency to address the substance of the protests, and asked the Board to remand the appeals. The Acting Assistant Secretary noted that his action should not be construed as depriving the Board of jurisdiction over any issue concerning proper lease issuance which may arise in a future appeal (Memorandum, July 5, 1984, to the Director, Office of Hearings and Appeals). By order of July 25, 1984, the Board vacated BLM's decisions, dismissed the appeals filed by LNRA and the State, and remanded the cases to BLM. There followed an extensive review of area geology.

7/ This expansion was effective Aug. 11, 1986, and involved lands in lease NM-A 37364(TX). It was based on geologic investigation and completion of Bay Rock's No. 1 Robbins Well in the Frio Formation near the Palmetto Bend reservoir. As noted infra, this lease was issued effective Oct. 1, 1983. The effect of an expansion occurring after lease issuance is typically an increase in rental rate. 43 CFR 3103.2-2(d) (1983). In the BLM report which responds to the statement of reasons, BLM explained that the 330-acre KGS designation resulted from a wildcat discovery just outside the project boundary on private lands.

8/ Lease NM-A 33369(TX) was issued to Ralph M. Dawson on May 15, 1979, but it terminated when the lessee failed to pay timely rental. A similar fate befell lease NM-A 28522(TX), which BLM issued to Harris R. Fender on July 7, 1978. This lease was named in appellants' protests, but dropped from the notices of appeal filed by appellants in November 1987.

and NM-A 37369(TX), and the Board set aside these decisions with directions to BLM to review Anderson's offers in light of its recent (October 1981) official KGS determinations. Bruce Anderson, 63 IBLA 111 (1982). No leases were issued to Anderson at this time.

The record suggests that when the Anderson decision issued in April 1982, neither BLM nor BOR had notified LNRA of Anderson's offers. However, by memorandum of August 17, 1982, BOR asked BLM to withhold action on oil and gas applications in the Palmetto Bend Reclamation Project to allow LNRA to provide its input on the subject. The memorandum acknowledged that such input was required by lease agreement No. 8-07-56-L0337 and by the Land and Water Resource Management Plan.

Also on August 17, 1982, BOR sent to LNRA copies of pending oil and gas lease applications in the project and sought LNRA's comments and recommendations.

By letter dated August 24, 1982, LNRA informed BOR of its objection to any noncompetitive lease of lands in the project. Therein, appellant argued that noncompetitive lease terms (\$1 per-acre rent for a 10-year term with 12-1/2-percent royalty) were a "give-away" of the valuable mineral estate. In contrast to BLM's terms, LNRA pointed out that private leases are generally made for 3-5 years with a bonus of \$60-\$150 per acre and royalties of 16-2/3 - 25 percent.

In its objection letter, LNRA stated that appellants were obligated to repay the United States for construction costs of the Palmetto Bend Reclamation Project, and explained that revenues from the sale of minerals would be applied as a credit to reduce these obligations. Under the circumstances, appellants maintained that noncompetitive leasing of such minerals at BLM's "give-away" terms would be totally indefensible, and extremely detrimental to appellants and water users.

LNRA's letter made clear it had received from BOR in mid-July 1982 title report requests 9/ describing lands under application for lease.

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9/ Title Report requests are sent by BLM to the surface management agency of lands desired for leasing. The surface management agency of the Palmetto Bend Reclamation Project is BOR. See § 5(b) of lease NM-A 37362(TX) et al. The requests inquire, inter alia, whether conveyances to the United States contain mineral reservations and whether development of minerals would interfere with the primary purposes for which the land was acquired.

By memorandum of Feb. 19, 1980, BOR replied that it had no objection to leasing the tracts proposed for leasing for slant drilling or pooling, but requested that drilling be prohibited in the lands inasmuch as they were located in the active reservoir. On Jan. 5, 1982, BOR sent to BLM special stipulations prepared for the Palmetto Bend Reclamation Project (copy to LNRA). These special stipulations are similar, though not identical, to those actually signed by Anderson.

LNRA further acknowledged receipt of the first page of these applications in mid-August, but noted that it found these documents incomplete and, therefore, insufficient for adequate review.

The facts recited above are adequate to resolve the first argument offered by appellants in their statement of reasons on appeal. Appellants contend that BLM violated article 5 of the lease agreement, quoted supra, to notify LNRA of leasing proposals for project lands. The facts sketched above demonstrate, however, that as of mid-August 1982 LNRA was well aware of leasing proposals in the project, having received at least the first page of Anderson's eight applications and title report requests. Eight leases were issued to Anderson on September 1, 1983, more than one year after LNRA had objected to the noncompetitive nature of BLM's leasing program.

Appellants do not specify in what way BOR's "incomplete" lease documents hindered their review of Anderson's offers. The applications (offers) furnished to appellants embodied actual lease terms. Standard leasing forms were used, and basic leasing stipulations had been agreed to by LNRA and BOR in the May 1979 Land and Water Resource Management Plan. 10/ In the absence of greater specificity from appellants, we find

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fn. 9 (continued)

BOR's consent to leasing is the subject of a subsequent, undated memorandum cited by LNRA in its Mar. 22, 1984, statement of reasons (see affidavit of William R. Farquhar, Jr., at Exhibit A). This memorandum appears to address lands sought by Anderson in leases not at issue here. The memorandum refers to new "resubmitted" applications and contemplates future consent by BOR and consultation with LNRA. See also memorandum of Mar. 25, 1983, from the State Director, New Mexico, to the Director (510) in lease file NM-A 37362(TX), which indicates that Anderson has reapplied for tracts previously withdrawn and that BLM intends to work with BOR to obtain title data for these tracts.

10/ As set forth infra at note 11, this plan stated that approved lease applications would be subject to special stipulations outlined in an attached Exhibit C. Exhibit C contained six stipulations, each of which appears in altered form in the Anderson leases.

Appellants point specifically to stipulation #2 of Exhibit C and contend that nowhere in the Anderson leases is there any statement giving appellants the rights and powers they contracted for in lease agreement No. 8-07-56-L0337 and contract No. 14-06-500-1880. LNRA statement of reasons, Mar. 22, 1984, at item 4.

Stipulation #2 of Exhibit C provides:

"2. All surface work performed by lessee on the lands shall be under general supervision of the Regional Director, Bureau of Reclamation, and direct supervision of the Authority [LNRA] and subject to such conditions and regulations as they might prescribe. The plans and location for all structures, appurtenances thereto, and surface work on these leased lands shall be submitted to said Regional Director for approval in advance of commencement of any surface work on said leased lands. All oil or gas drilling and producing operations shall be under supervision of the

no merit in the contention that Anderson's eight leases were issued in violation of lease agreement No. 8-07-56-L0337 or any other document. 11/

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fn. 10 (continued)

Regional Oil and Gas Supervisor, U.S. Geological Survey, in accordance with 30 CFR, Part 221. Authorized representatives of Reclamation and of the USGS shall have the right to enter on the leased premises at any time to inspect both installation and operational activities of the lessee."

(Emphasis added.) Appellants correctly observe that this stipulation, as modified in the Anderson leases, contains no mention of LNRA's surface work supervisory powers.

Subsection 5b of lease agreement No. 8-07-56-L0337, quoted supra, provides that oil and gas leases will include stipulations to protect the interests of LNRA and project facilities. The lease agreement also provides (at section 1) that the United States leases the project lands in accordance with the Land and Water Management Plan.

No explanation is offered by BLM for its omission of LNRA's surface work supervisory powers in the Anderson stipulations. Such omission is a departure from the lease agreement and plan. Given BOR's general supervisory powers, however, it does not appear that project facilities or LNRA will be unprotected. See also Onshore Oil and Gas Order No. 1, 48 FR 48916, 48922 (Oct. 21, 1983), requiring BLM to consult with the surface management agency "and with other appropriate interested parties" in reviewing an application for permit to drill.

The record is clear, moreover, that in January 1982 LNRA was sent a copy of the surface work stipulation that included no reference to its surface work supervisory powers. See memorandum of Jan. 5, 1982, from the Regional Supervisor, BOR, to the Chief, Oil and Gas Section, BLM, Santa Fe (copy to LNRA). If such stipulation constituted a material breach by the United States of appellants' contract rights, it is reasonable to expect that appellants would have voiced an objection. The record, however, is silent.

Also silent in appellants' pleadings is a discussion of the consequences flowing from breach of contract. No statute, regulation, or case law is cited that authorizes cancellation of a lease issued under such circumstances. See generally 30 U.S.C. § 188 (1982); Boesche v. Udall, 373 U.S. 472 (1963); John Bloyce Castle, 81 IBLA 53 (1984). The burden of providing such authority rests with appellants. Bob G. Howell, 75 IBLA 113 (1983).

11/ Appellants assert that repayment contract No. 14-06-500-1880 confers upon LNRA a concurrent right with the United States to lease minerals in the project. In support, appellants cite to section 33(e) of that document, which states in part:

"e. The Authority may issue and administer subleases, licenses, and permits, for periods not to exceed the term of this agreement, for the purpose of regulating the privileges to be exercised, and concession contracts under which commodities and services are made available to the public in the reservoir area, provided, that the Authority shall not grant rights-of-way or issue permits or licenses for houseboats, home or cabin sites, or removal of minerals. All such subleases, licenses, permits, and

BLM's decision of September 29, 1987, which reached a similar conclusion on different grounds, may be affirmed but as modified above.

The real thrust of appellants' objection goes to the revenues that BLM's noncompetitive leases would produce. In short, appellants prefer lease terms that will retire their debt obligations faster. Indeed, in their objection letter of August 24, 1982, appellants recommend that project leases "be exempted from the present rules and regulations and be administered for the benefit of [project] sponsors and water users."

Appellants' argument, although understandable, overlooks the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359 (1982), and lease agreement No. 8-07-56-L0337. This latter document at article 5, quoted

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fn. 11 (continued)

concession contracts shall be submitted to and approved by the United States prior to issuance by the Authority."

(Emphasis added.) We find no support for appellants' theory and set forth the underscored passage as sufficient refutation.

Nor do we find that the Land and Water Resource Management Plan supports appellants' theory. Section III.D.4 provides:

"4. All future agreements, licenses, leases, or other grants to third parties will be subject to provisions of this management plan as outlined herein as well as all terms and conditions of all other contracts and agreements between Reclamation and the Authority as pertains to the Palmetto Bend Project. Responsibilities for such agreements, etc., shall be as follows:

"a. Oil, gas, and other mineral leases on mineral interests owned by the United States are issued and administered by the State Director, Bureau of Land Management (BLM), Santa Fe, New Mexico. Applications received by Reclamation from the BLM will be reviewed with the Authority, and approved lease applications will be subject to the special stipulations as outlined in exhibit "C," attached hereto.

"b. Agreements, licenses, leases, or other grants of land or land-use rights other than oil, gas, and mineral leases to third parties for utility or pipeline rights-of-way will be issued by Reclamation after consultation with the Authority; however, all such agreements will be administered by the Authority. Lands acquired primarily for recreation, fish and wildlife enhancement, or for other special purposes shall be reserved for those uses.

"c. The Authority will have the responsibility to negotiate and enter into all other contracts with responsible third parties, either private, Government, or quasi-governmental, for development, management, operation, and maintenance of all or any portion of the project area, subject to review and approval of Reclamation."

(Emphasis added.) A careful reading of the passages underscored in subsections a. and c. reveals that the Plan drafters used explicit language when they sought to require the concurrence of both LNRA and Reclamation in the award of a contract. The contrasting language in subsections a. and c. makes clear that BLM's authority to issue oil and gas leases was not dependent upon approval by LNRA.

supra, authorizes the grant of mineral leases by the United States under existing Federal leasing laws; no alternative authority is suggested.

Because the lands in Anderson's leases were purchased by the United States for the project dam and reservoir, the lands are properly regarded as acquired lands. At all relevant times here, the existing Federal leasing laws for acquired lands were collected in the Mineral Leasing Act for Acquired Lands, supra.

[1] Section 3 of this Act, 30 U.S.C. § 352 (1982), states that all deposits of oil and gas which are owned or acquired by the United States may be leased by the Secretary "under the same conditions as contained in the leasing provisions of the mineral leasing laws." Prior to their amendment by the Federal Onshore Oil and Gas Leasing Reform Act of 1987, see note 5 supra, the oil and gas leasing laws authorized competitive bidding, such as that sought by appellants, only for lands "within any known geological structure [12/] of a producing oil or gas field." 30 U.S.C. § 226(b)(1) (1982). Appellants' repayment obligation under contract No. 14-06-500-1880 was, therefore, wholly irrelevant to the method used by BLM to issue the eight Anderson leases.

If BLM correctly determined that the lands leased noncompetitively to Anderson were not within a KGS, its September 29, 1987, decision must be affirmed. Appellants contend BLM's KGS determinations are wrong, because the boundaries of the KGS areas follow surface lease lines or boundary lines of the project. In fixing the boundaries of the KGS's, appellants charge, BLM should have considered actual competitive interest in the lands as required by Arkla Exploration Co. v. Texas Oil & Gas Corp., 734 F.2d 347 (8th Cir. 1984). Finally, appellants state that they were denied certain materials relied upon by BLM in issuing its September 29, 1987, decision. Without such materials, a critique of BLM's geologic analysis is impossible in appellants' view.

BLM's efforts to determine the limits of the KGS's at issue are set forth in extenso in the agency response to appellants' statement of reasons:

#### Historical setting

All of the area within what is now included in the Palmetto Bend Project, Jackson County, Texas, was in private and State mineral ownership during the Frio sand trend oil and gas "Boom" in the Texas Gulf Coastal region during the late 1940s, 1950s and 1960s. The area, now covered by the Palmetto Bend Reservoir, was intensely explored for hydrocarbons to an average well density of

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12/ A "known geological structure" is technically the trap in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive. 43 CFR 3100.0-5(l) (1987).

one drill hole per approximately 100 acres. Numerous small and large oil and gas fields were discovered and produced to near abandonment. These fields and the juxtaposed nonproductive areas were defined by numerous dry holes. It was not until the late 1970s and early 1980s that leasing and exploration were revived, and then it consisted predominately of drilling for new and deeper Frio sands within the field limits outside the project area.

It was during the inactive period of the early 1970s that the Bureau of Reclamation (BOR) acquired the mineral rights within the project area and proceeded with its construction. By the time construction ended, almost all of the oil and gas wells within the project were being abandoned because economic limits had been reached.

Studies of the Palmetto Bend Project area were commenced by the Tulsa Office of the U.S. Geological Survey when over-the-counter (OTC) lease applications were received in 1978, 1979, and 1980. When it became apparent from oil industry publications and well data, [sic] of the general nature of the producing areas, it was decided to establish KGS areas, with appropriate buffer zones, to correspond to the limits of production of the now abandoned oil and gas fields present within the Palmetto Bend Project area.

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KGS procedures used

The old, abandoned producing areas, as shown on current oil and gas base maps of the PBP [Palmetto Bend Project] area, were simply enclosed within KGS boundaries. The width of buffer zones around these abandoned producing areas were determined by the locations or [sic] dry holes drilled through the producing sands, the locations of poor or marginal producers, State well spacing, administrative considerations such as tract surveys and configurations, and the presence of non-KGS "windows" that should be included.

Well data, field information, and geologic publications from various sources all indicated that the numerous hydrocarbons accumulations present, both within and adjacent to the project, were trapped in thin, highly erratic, and discontinuous sands occurring principally in the Frio Formation of Oligocene age at depths ranging from 5000 to 7500 feet. Some minor, shallower production is also present in the Lower Miocene and the Oligocene Anahuac Formation. These hydrocarbon accumulations are, reportedly, due to a combination of stratigraphically and structurally controlled traps. The projection of these types of hydrocarbon reservoirs for any distance was considered very unlikely, due to the erratic, discontinuous nature of the individual pay sands. This rationale is evidenced by the multiple

reservoirs (eighty-plus) established in hearings before the Texas Railroad Commission.

(Agency Response, Feb. 8, 1988, at tab marked "BLM Response 2" at 2 and 4). A party challenging a KGS determination by BLM has the burden of showing by a preponderance of the evidence that BLM's determination is wrong. Vera Kochergan, 99 IBLA 194, 197 (1987). Accord, Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984). Our review of the record convinces us that appellants have not met this burden. We hold further that appellants are not entitled to a hearing because they have raised no material issue of fact.

Appellants' criticism that KGS perimeters follow surface lease lines or project boundary lines does not support a contrary result. Past practice of the Department has been to draw the exterior boundary of a KGS on the basis of the smallest legal subdivision invaded by the edge of the producing structure. Pamela S. Crocker-Davis, 94 IBLA 328, 331 (1986). This practice is set forth in the 1981 Conservation Division Manual at section 620.3E: "The limits of a KGS should be described in units no smaller than the smallest legal subdivision-quarter quarter section, surveyed tract or lots." Because this practice causes slightly more lands to be included within a KGS than are actually on structure, the practice works in appellants' favor and generally causes a KGS perimeter to reflect property boundaries. A structure underlying lands both within and outside project boundaries will necessarily reflect in part project boundaries because a KGS designation affects only Federal lands. Lands outside project boundaries are in private ownership.

The Arkla decision cited by appellants involved lands in the Eighth Circuit and is, therefore, not controlling here. See Carol Ann Hoffman, 100 IBLA 139, 144 (1987). However, we note that were it controlling, the case is distinguishable by its contrasting factual setting. Arkla involved lands within a military reservation newly opened to oil and gas leasing. Well data for reservation lands was necessarily sparse, and KGS limits were determined by stepping out a fixed distance (usually one mile) from a producing well. Geologic analysis played a small part in defining KGS limits. Given the dearth of hard data and the presence of substantial bonus bids for nearby lands, the Court of Appeals held that the competitive interest represented by such bids should have been considered by BLM.

In the instant case, project lands have been extensively explored at a well density of one hole per 100 acres approximately (Agency Response, Feb. 8, 1988, at tab marked "BLM Response 2" at 2). Old, abandoned producing areas were included within KGS boundaries, and dry holes helped to define the limits of the highly erratic and discontinuous producing sands. Approximately 7 work months were devoted to collecting and analyzing well records, logs, and production data preparatory to the KGS determinations. Id. at 4.

The breadth of geologic data available to BLM removed the need to consider competitive interest, which may involve considerable speculation, in defining KGS limits. The record makes clear, however, that BLM was

aware of competitive interest. 13/ Upon its receipt of a request for competitive leasing of project lands, BLM called for a preliminary structure report of the project lands involved. 14/ In the factual setting here, we believe this limited use of competitive interest satisfied any Arkla requirements.

In their statement of reasons, appellants charge that they were denied access to data reviewed by BLM in issuing its decision of September 29, 1987. Without such data, appellants contend, the "generalizations" of the decision cannot be intelligently discussed. Appellants state that they visited the New Mexico State Office, but were not permitted to review BLM's data "until the statement of reasons is filed." Id. at 2.

In response, BLM claims that appellants were "at no time \* \* \* denied access to official BLM documents regarding the KGS study." The origin of appellants' misunderstanding, BLM states, may be traced to BLM's statement to appellants that it could not respond to the arguments of an appeal until a statement of reasons had been received. 15/

BLM's decision of September 29, 1987, refers to three sources of data that the agency used in addressing appellants' protests: data provided by appellants; geologic investigations leading to a 330-acre expansion of the KGS; and BLM's final report of February 20, 1985. It may be safely assumed that appellants retained copies of their own data. Investigations supporting the KGS expansion by 330 acres, effective August 11, 1986, occurred after lease issuance (Sept. 1, 1983) and are, therefore, irrelevant to the noncompetitive nature of Anderson's leases. See Skelly Oil Co. v. Morton, No. 74-411 (D. N.M. July 16, 1975). 16/ BLM's final report of February 20, 1985, addresses geologic data submitted by appellants and appears to have been readily available at all times. See lease file NM-A 37362(TX). No basis for appellants' argument is apparent from this analysis.

The agency response of February 8, 1988, refers to an incomplete KGS review made in July 1985 that the New Mexico State Office could not release

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13/ See Chronology of KGS Action taken by BLM attached as item 5 of Appendix 1 to BLM's report addressing appellants' statement of reasons.

14/ Memorandum of July 22, 1980, from Chief, Oil and Gas Division, BLM, Santa Fe, to Area Oil and Gas Supervisor, Geological Survey, Tulsa (Lease file NM-A 37362(TX)).

15/ Memorandum of Dec. 28, 1987, from the Deputy State Director, Mineral Resources, BLM, Santa Fe.

16/ This data was apparently discussed by LNRA and BLM in a meeting on Nov. 23, 1987, in Tulsa. See report addressing appellants' statement of reasons, supra note 13, at 6. A brief report, dated Oct. 14, 1986, of the "recent" wildcat well causing the KGS expansion is found in lease file NM-A 37364(TX). Accompanying this report is a map of the KGS addition displaying considerable well data. The relevance of data collected after lease issuance is discussed infra at note 17.

"because of its unofficial nature." Id. at 6. It is difficult to determine whether this study or other data is the information described by appellants' statement of reasons. 17/ The record is clear, however, that appellants did not pursue the matter by filing a request under the Freedom of Information Act, 5 U.S.C. § 552 (1982). Departmental regulations describing the procedures for obtaining such information are set forth at 43 CFR Subpart B, and appellants are familiar with these procedures. 18/ See Solicitor's Opinion, M-36753 (July 10, 1968), and C.V. Armstrong, A-30889 (Feb. 28, 1968).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the New Mexico State Office is affirmed as modified.

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Gail M. Frazier  
Administrative Judge

I concur:

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Franklin D. Arness  
Administrative Judge

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17/ The relevance of BLM's 1985 study to Anderson's 1983 noncompetitive leases is problematic. Skelly Oil Co. v. Morton, supra, makes clear that well data available to BLM at the time of lease issuance, but not within its actual knowledge then, cannot support cancellation of a noncompetitive lease. A fortiori, data collected by BLM after lease issuance cannot support lease cancellation.

18/ See LNRA's protest of Nov. 21, 1983, at 5 and also the State's protest of Dec. 29, 1983, at 4. The parties state that information relevant to the protest was being requested under the Freedom of Information Act.